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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 466

HERMAN GREENBERG,
Appellant,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA

APPEAL FROM THE DISTRICT COURT OF APPEAL, SECOND APPELLATE DISTRICT, STATE OF CALIFORNIA

STATEMENT AS TO JURISDICTION

MORRIS LAVINE,
Counsel for Appellant.

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SUPREME COURT OF THE UNITED STATES

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HERMAN GREENBERG,

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THE PEOPLE OF THE STATE OF CALIFORNIA,

Appellee

STATEMENT OF JURISDICTION ON APPEAL

In compliance with Rule 12 of the Rules of the Supreme Court of the United States, appellant herewith presents a statement of jurisdiction on appeal:

A

The statutory provisions which sustain jurisdiction are Section 237 of the Judicial Code (28 U. S. C. A. 344) as Amended, by Act of January 31, 1928, Chapter 14, 45 Stat. 54, and Act of April 26, 1928, Chapter 440, 45 Stat. 466.

B

This appeal involves a challenge under the Fourteenth Amendment to the Constitution of the United States of Article I, Section 13, of the Constitution of the State of

California, as Amended in 1934, virtually making the silence of an accused tantamount to an admission or confession in open court of his guilt of a crime by reason of his silence.

The challenge is based upon the due process of law clause and the privileges and immunities clause of the Fourteenth Amendment to the Constitution of the United States, the same challenge which has been placed before the United States Supreme Court in the case of *Adamson* v. *People of the State of California*, a death penalty case arising in the Supreme Court of California. The appeal in the *Adamson* case was allowed by Justice Wm. O. Douglas of the Supreme Court of the United States and the transcript of the record is now being prepared in that case, to be forwarded to the Supreme Court of the United States for its consideration and determination.

It is desired that the said question which is also raised in the instant case be passed upon by the Supreme Court of the United States, determining the fundamental issues herein involved.

This case has the additional factor of not only treating the silence of the defendant as tantamount to an admission of guilt by reason of his failure to explain or deny the circumstances against him, it has the objections of counsel to the procedure, which were not made in the *Adamson* case, and it also has the attempt to compel the accused to stand up in the courtroom, and the comments by the prosecutor on his refusal to do so, as further evidence of his guilt by his silence and his non-compliance with a demand or attempt to have him incriminate himself.

The statute was first challenged in the trial of the case by objections to the prosecutor's conduct and to the procedure and proceeding, and the statute itself was challenged in the trial court as violative of the Fourteenth Amendment to the Constitution of the United States (R. Tr. 193, 194).

The challenge was renewed in the trial court through objections to the comments of the prosecutor by requests for instructions which were denied (Cl. Tr. 23-31).

The challenge was renewed again in the District Court of Appeal (Opening Brief, p. 5, *et seq.*), and considered by that court, and the challenge was there denied.

A petition for hearing before the Supreme Court was duly and regularly prepared within the time allowed by law, and the challenge there again renewed and denied by that court.

The District Court of Appeal was, therefore, the highest court of the State from which a decision could be had.

C

The judgment in said case was rendered by the District Court of Appeal of the State of California, Second Appellate District, on March 27, 1946; a petition for hearing was filed in the Supreme Court of the State of California, in accordance with California Supreme Court Rule No. 28, and was denied by the Supreme Court of California on April 25, 1946.

Application for appeal was presented to the presiding judge of Division Three of the District Court of Appeal, Second Appellate District, of the State of California, on May —, 1946.

D

Nature of the Case and Rulings Below:

Appellant stands convicted of the crime of grand theft and is under sentence to the State penitentiary.

The defendant at all times denied the charges. However, during the trial of the case he did not take the witness stand and stood upon his constitutional right to remain silent and his constitutional right not to be compelled in open court to make any admission or confession, and upon his con-

stitutional right not to have the burden of proof shifted to him. The trial court, however, held that such failure on his part to explain or deny the testimony against him was a matter which the jury could consider in determining the guilt of the defendant. The jury was so instructed by the trial court.

The prosecutor also attempted to force the defendant to stand in open court, and commented on his failure to do so as evidence of his guilt.

Appellant contends that the 1934 Amendment to Article I, Section 13 of the California Constitution and Section 1323 of the California Penal Code, permitting the court and the prosecutor to comment on and the jury to consider the defendant's failure to explain or deny any evidence against him, permit an inference or presumption of guilt from the defendant's silence, and inherently, and as construed and applied to this case, are unconstitutional as infringing the due process clause and the privileges or immunities clause of the Fourteenth Amendment to the Constitution of the United States.

The fundamental question is raised in this case of whether a statute which coerces a defendant in a criminal case to take the witness stand in the very presence of the court and jury and during the trial on the penalty that if he fails to do so, a confession of guilt is inferred by his silence and the prosecutor and court are permitted under the challenged statute to tell the jury that the defendant's silence is a confession of guilt, infringes the privileges and immunities clause and the due process clause of the Fourteenth Amendment to the United States Constitution.

In the present case, pursuant to the Constitutional amendment to the California Constitution and statutes authorized by that amendment, the prosecutor throughout his argument to the jury, told the jury that the failure of the de-

fendant to take the witness stand and personally explain or deny the evidence against him and his silence in the courtroom is an admission of guilt. The prosecutor even went to the extent of requesting the defendant to arise in the courtroom.

The statements of the prosecutor followed the California Superior Court's interpretation of Article I, Section 13 of the California Constitution as amended in 1934 and Penal Code Section 1323 and received the judicial approbation of that court, the District Court of Appeal of the State of California, and the Supreme Court of the State of California.

These issues were first raised in the trial court, by objections to the prosecutor's argument (R. Tr. p. 193, 194), upon motion for a new trial (Cl. Tr. p. 33), in defendant's notice of appeal (Cl. Tr. 36), and in the District Court of Appeal (Appellant's Opening Brief, p. 5, 7), and in a petition for hearing in the Supreme Court of California.

Appellant also claims and claimed below that the effect of the above-mentioned constitutional amendment and code section, inherently, and as construed and applied in this case, permit the jury to draw an inference or presumption of guilt from the defendant's silence and thus unconstitutionally shifts the burden of proof, or the burden of going forward, to the defendant, thus denying to the defendant that fair and impartial trial required by due process of law.

Appellant contends that the State Constitutional Provision and Penal Code Section, inherently, and as construed and applied in this case, establish or permit an inference of guilt to be drawn by the jury from the fact that the defendant does not take the witness stand and himself deny or explain evidence against him; appellant contends that no logical or rational connection exists between the premise, the foundational fact, to wit, defend-

ant's failure to explain or deny, and the fact inferred or presumed, namely, the defendant's guilt, and therefore that the State Constitutional Provision and corresponding Penal Code section in this case take the defendant's liberty without due process of law.

Appellant supported these contentions in the District Court of Appeal of the State of California, and in the Supreme Court of the State of California by the citation of decisions from high courts, including *Tot* v. *U. S.*, 319 U. S. 463, 87 L. Ed. 1519; *Vierick* v. *U. S.*, 318 U. S. 236, 87 L. Ed. 735; *Weaver* v. *Palmer Bros. Co.*, 270 U. S. 402, 70 L. Ed. 654.

The District Court of Appeal, Second Appellate District, of the State of California, by its judgment and the Supreme Court of the State of California, by denial of a petition for hearing to review the judgment, held that the Constitution of the United States in the due process clause and the privileges and immunities clause of the Fourteenth Amendment to it, inherently and as construed and applied in this case, do not protect an accused in the State of California from either being compelled to take the witness stand in self-defense, or have the failure of the defendant personally to take the witness stand and explain or deny the evidence against him be considered by the jury as admission of guilt. The District Court of Appeal further held that such procedure and proceedings, inherently and as construed and applied in this case, do not unconstitutionally shift the burden of proof to the defendant, and do not violate the privileges and immunities clause of the Fourteenth Amendment to the Constitution of the United States.

The District Court of Appeal of the State of California held that Article I, Section 13 of the Constitution of the State of California, inherently, and as construed and applied in this case, does not offend the Fourteenth Amend-

ment to the Constitution of the United States in its due process clause and in its clause guaranteeing the privileges and immunities of citizens of the United States by allowing comment by the court and counsel on the failure of the defendant to take the witness stand and testify and by permitting the jury to arrive at a verdict of guilty upon the basis of the Constitutional provision and the statutory provision pursuant thereto, permitting the jury to consider and decide the case against the defendant by reason of his failure to explain or deny evidence against him.

The District Court of Appeal of the State of California, inherently, and as construed in this case, further held that Article I, Section 13 of the Constitution of the State of California as Amended, and Section 1323 of the California Penal Code do not violate the Fourteenth Amendment to the Constitution of the United States in that the presumption or inference of guilt arising from the failure of the defendant in open court to take the witness stand and testify and explain any evidence against him is sufficient to base a conviction of guilt, and that there is a reasonable and rational connection between the failure of a defendant personally to testify and explain or deny the evidence against him and the inference of guilt which arises from such failure to personally explain or deny the evidence against him.

E

The statutory provisions which are challenged and upon which this appeal is based are as follows:

Article I, Section 13, Constitution of California, as Amended in 1934;

Section 1323 of the Penal Code of the State of California;

The Fourteenth Amendment to the Constitution of the United States.

MORRIS LAVINE,
Attorney for Appellant.

Cases Believed to Sustain Jurisdiction

F

Wilson v. *Cook*, No. 328, #329, October 1945 Term, 90 L. Ed. 609, decided March 4, 1946;
Lisenba v. *California*, 314 U. S. 219, 86 L. Ed. 166;
Wall v. *Chesapeake & Ohio R. R. Co.*, 256 U. S. 125, 126;
Fisk v. *Kansas*, 274 U. S. 380, 71 L. Ed. 1108;
Nickey v. *Mississippi*, 292 U. S. 393, 394, 78 L. Ed. 1323, 1324;
Whitfield v. *Ohio*, 297 U. S. 431, 435-436, 80 L. Ed. 778-781;
Bram v. *U. S.*, 168 U. S. 532, 42 L. Ed. 568;
Twining v. *N. J.*, 211 U. S. 78, 53 L. Ed. 97;
Ashcraft v. *Tennessee*, 322 U. S. 143;
Hysler v. *Florida*, 315 U. S. 411, 86 L. Ed. 932;
Taylor v. *Mississippi*, 319 U. S. 583, 87 L. Ed. 1600;
Tot v. U. S. (1943), 319 U. S. 463, 87 L. Ed. 1519;
Cobbledick v. *U. S.*, 309 U. S. 323;
Catlin v. *U. S.*, 324 U. S. 329;
Mobile J. & K. Ry. v. *Turnipseed*, 219 U. S. 35, 55 L. Ed. 78;
Western & A. R. R. v. *Henderson*, 279 U. S. 639, 73 L. Ed. 884;
Casey v. *U. S.*, 276 U. S. 413, 72 L. Ed. 632;
Bailey v. *Alabama*, 219 U. S. 219, 55 L. Ed. 191;
Morrison v. *California*, 291 U. S. 82, 76 L. Ed. 664;
Whitney v. *California*, 274 U. S. 357;
Stromberg v. *California*, 382 U. S. 359;
Fleming v. *Fleming*, 264 U. S. 29;
Cumberland Coal Co. v. *Board of Revision*, 284 U. S. 23;
Cincinnati P. B. S. & P. Packet Co. v. *Bay*, 200 U. S. 179;
Patterson v. *State of Alabama*, 294 U. S. 600;

Brown v. *Mississippi*, 297 U. S. 278;
Ziang Sun Wan v. *U. S.*, 266 U. S. 1, 69 L. Ed. 131;
Moore v. *Dempsey*, 261 U. S. 86;
Powell v. *Alabama*, 287 U. S. 45;
Herbert v. *Louisiana*, 272 U. S. 321;
Mooney v. *Holohan*, 294 U. S. 103;
Holden v. *Hardy*, 169 U. S. 366;
Galpin v. *Page*, 18 Wall. 350, 368.

Grounds Upon Which It Is Contended the Questions Involved Are Substantial

This case involves an important and far-reaching amendment to the Constitution of the State of California in 1934, providing in Article I, Section 13 of the Constitution that the court and counsel in a criminal case in the State of California may comment upon the failure of the defendant *personally* to take the witness stand and explain or deny any evidence against him. A similar provision is incorporated in the Penal Code of the State of California, being Section 1323.

The effect of this statute, inherently and as construed and applied by the courts of the State of California, is either to compel the accused to take the witness stand in a criminal case, or else have his failure to do so considered by the jury as tantamount to an admission or confession of guilt.

It is not sufficient in such a case that the evidence be explained by any other person—the accused personally must take the witness stand or the consequences of his silence are tantamount to admission or confession of guilt.

In *Lisenba* v. *California*, 314 U. S. 219, 237, 86 L. Ed. 167, this court said, as applied to a criminal trial:

> "Denial of due process is the failure to observe that fundamental fairness essential to the very concept

> of justice. In order to declare a denial of it we mus find that the absence of that fairness fatally infecte the trial; the acts complained of must be of suc quality as necessarily prevent a fair trial. Such un fairness exists when a coerced confession is used as means of obtaining a verdict of guilt. . . . To extor testimony from a defendant by physical torture in th very presence of the trial tribunal is not due process.'

In this case, a statute extorts testimony from a defend ant in the very presence of the trial tribunal, or if h fails to testify, the statute authorizes the jury to find hi guilty because he personally fails to explain or deny th evidence against him.

In this case, the defendant was charged with the crim of grand theft, and at the trial, elected not to take th stand and testify. Pursuant to the Constitutional pro vision and the section of the penal code, the prosecutor i his argument to the jury repeatedly commented upon th defendant's failure to take the witness stand, and argue that his silence meant he was guilty, and the jury was in structed by the court that the failure of the defendant t take the witness stand could be considered by the jury

The case is important as determining whether in th United States of America an accused may thus be compelle to take the witness stand, or if he fails to do so, let th jury determine from his failure to take the witness stan that he could not explain or deny the evidence against hi and that his silence therefore is tantamount to his guil contrary to the ancient, honored principles of crimina justice in the United States of America.

The appellant contends, as he has contended in th State courts, that no rational connection exists between th premise; that is, the defendant's silence, and the defend ant's guilt, and that, theerfore, the 1934 Amendment to Art cle I, Section 13, of the California Constitution and the Cal

fornia Penal Code, Section 1323, infringe the guarantees of the privileges and immunities clause and the due process of law clause of the Fourteenth Amendment to the Constitution of the United States.

Appellant did not take the witness stand in this case, not by reason of any consciousness of guilt, but because of prejudice that might arise against him by reason of former conviction of felony if disclosed to the jury, by impeachment, which in the State of California, is a ground of impeachment.

The appellant contends here, as he contended in the State courts, that he was denied due process of law guaranteed by the Fourteenth Amendment, and the privileges and immunities clause of the Fourteenth Amendment to the Constitution of the United States were infringed.

MORRIS LAVINE,
Attorney for Appellant.

APPENDIX

Opinion of the District Court of Appeal of the State of California

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT, DIVISION THREE

Crim. No. 3927

The People of the State of California, *Plaintiff and Respondent,*

vs.

Herman Greenberg, *Defendant and Appellant*

Appeal from a judgment of the Superior Court of Los Angeles County, and from an order denying motion for new trial. Charles W. Fricke, Judge, affirmed.

For Appellant: Morris Lavine.

For Respondent: Robert W. Kenny, Attorney General, Frank Richards, Deputy Attorney General; Fred N. Howser, District Attorney, Robert Wheeler, Deputy District Attorney.

By information, appellant Herman Greenberg was accused of the crime of grand theft and of having suffered a prior conviction of a felony; he admitted the prior conviction, was tried by a jury and found guilty of grand theft. He was sentenced to State Prison, made a motion for new trial, which was denied and he appeals from the order and from the judgment.

Appellant did not take the stand at the trial. The prosecutor commented upon that fact in his arguments to the jury and the court gave an instruction upon it. As one of the grounds of the appeal it is argued that Section 1323 of the Penal Code and Article I, section 13, of the State Constitution, as amended in 1934, which permit the court and counsel to comment upon the failure of a defendant to explain or deny by his testimony any evidence or facts in the case against him, and allow the same to be considered by the

court or jury, are in violation of the 14th Amendment to the Constitution of the United States, in that such procedure deprives the defendant of due process of law. Since the briefs were filed, it has been decided that the Penal Code section of the 1934 amendment to the Constitution *do* not violate the due process clause of the 14th Amendment. The identical question and the same arguments were presented to the Supreme Court in *People* v. *Adamson*, 27 A. C. 495, and were decided adversely to the contentions of appellant.

The court gave the following instruction: "The failure of a defendant to personally take the witness stand and testify is not evidence in the case but the failure of a defendant to explain or to deny by his own testimony any evidence or facts in the case against him, may be commented upon by counsel, and may be taken into consideration by you as jurors." The court refused to give defendant's offered instruction as follows: "You are instructed that the failure of a defendant to take the witness stand does not constitute evidence in the case. You are further instructed that the defendant can only be convicted upon legal, competent evidence presented in court, and not on the absence of any evidence." The requested instruction was properly refused. It is the failure of the defendant to explain or deny evidence or facts against him, when it appears that he could do so, if innocent, not his mere failure to take the witness stand, which may be commented upon and taken into consideration. The substance of the requested instruction was covered by those which were given.

It is not enough to instruct the jury that the failure of a defendant to explain or deny evidence or facts which are against him may be taken into consideration by the jury. An instruction should embody the substance of the rule, as stated in *People* v. *Adamson, supra*, page 507, "that the defendant's failure to deny or explain evidence presented against him does not create a presumption or warrant an inference of guilt, but should be considered only in relation to evidence that he fails to explain or deny; and that if it appears from the evidence that defendant could reasonably be expected to explain or deny evidence presented against him, the jury may consider his failure to do so as tending to indicate the truth of such evidence and as indicating that

among the inferences that may reasonably be drawn therefrom, those unfavorable to the defendant are the more probable." The failure to give a more comprehensive instruction was not an error which would justify a reversal of the judgment. Two witnesses for the prosecution identified the defendant as one of two men who committed the theft; two witnesses testified for defendant that he was at a place far removed from the scene of the theft at the time of its commission. The subject of the theft was a fur coat of a value in excess of $1900 and it was taken from a display window on Wilshire Boulevard in Los Angeles. A maid who was working at the front of the store testified that she first saw defendant and a male companion outside the store at about 10 o'clock a. m. Defendant was described as a small man, his companion as a large one. The two were seen to pass the door and stand on the sidewalk 20 or 30 feet from it for about an hour; defendant carried a shopping bag and a brief case. Defendant came into the store through the right-hand door and the other man through the left-hand door. Defendant stood in the store for about 10 minutes and the other man for a longer time. Defendant left and took a stand outside, closer to the door than formerly, and the maid a little later from the mezzanine floor saw defendant enter the store again for a few minutes, return to the sidewalk, where he conversed with the other man, and again enter the store at about 11:50 and take the coat from the center window and immediately walk out of the store and disappear around the end of the building. The maid reported the occurrence to the store manager. Another witness, a grocery clerk, was resting in a truck on a vacant lot close to the store from which the coat had been taken. He testified that he saw a large man running past the truck with a brown fur coat under his arm; that he saw him throw the coat into a car which was standing on a side street and facing Wilshire Boulevard and saw him then walk over by an alley where he met defendant on the sidewalk. He testified that defendant was carrying a brief case, that the two men stood about 50 feet from him, that the large man walked away and defendant entered the car, turned it around and drove away. This witness took down the car number and later gave it to the police. It was by

means of this car number that defendant was located, and after his arrest he admitted owning a car bearing that number. One of defendant's witnesses testified that defendant was in his garage on the day of the theft at approximately 12 o'clock, and another witness testified that defendant was in his automobile repair shop from about 12 until 12:45 or 1:00 o'clock, discussing repairs on the car, which was brought back later on in the afternoon.

The evidence of the prosecution was direct. The sole question was one of credibility of the witnesses and the accuracy of their recollection. It would have been proper to instruct that the failure of defendant to deny that he stole the coat was a circumstance which tended to strengthen the testimony of the witnesses, who identified him as the thief. From a consideration of the entire evidence, we believe the jury would have taken this view of the matter and we cannot believe that they would have given any other effect to the failure of defendant to testify in his own behalf. The instruction which was given was not misleading and a fuller instruction was not required for the protection of the substantial rights of the defendant.

Defendant requested the following instruction: "To the information in this case, the defendant has interposed the plea of not guilty, which puts in issue every allegation of the information, and entitles the defendant to the defense known in law as an alibi, that is, that the defendant was not at the place where the crime charged is alleged to have been committed, when it is alleged to have been committed, but at another place, and I instruct you that such a defense is as proper and legitimate, if proved, as any other. (The defendant is not bound to prove his defense of an alibi, but if his) If the evidence creates a reasonable doubt in your mind as to his presence at the time and place where the crime is alleged to have been committed, it is your duty to acquit him." It was given after being modified by striking out the words in brackets and inserting the words "If the" in the second sentence. Another instruction requested by defendant called attention to the fact that the witnesses for the prosecution had fixed the time of the theft as between noon and 1:00 p. m., and was otherwise substantially the same as the one given. There was no error in modifying

the first instruction or in refusing the second one. The jury had to choose between the testimony of the two witnesses for the prosecution and those for the defense. If defendant was at the garage and repair shop at the time of the theft, he could not have committed it. The jury believed the witnesses for the prosecution. The instruction on alibi that was given was sufficient.

During the direct-examination of one of the witnesses who had indentified defendant as the thief, defendant, at the request of the prosecutor, was directed by the court to stand for the purpose of identification. Defendant's counsel declined to permit him to stand and assigned the request and the direction of the court as misconduct. When so much depended upon the ability of the witness to identify the defendant as the man she had seen take the coat, she should not have been aided in any way in making such identification. But she had identified him in jail a few days after the theft, and it does not appear that defendant was pointed out to her in the court room or that there was any question as to her ability to identify him. No error or irregularity occurred at the trial which would justify a reversal of the judgment.

The order denying the motion for new trial and the judgment are affirmed.

SHINN, *J.*

We concur.

DESMOND, *P. J.*,
WOOD, *J.*